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No. 81

In the Supreme Court of the United States

OCTOBER TERM, 1958

WHITLOCK CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 11-30) is reported at 159 F. Supp. 602.

JURISDICTION

The judgment of the Court of Claims was entered on March 5, 1958. The petition for a writ of certiorari was filed on June 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether an increase in the cost of performance, resulting from the insolvency of its supplier,

frustrated petitioner's purchase contract with the Government and relieved it of its obligations thereunder.

2. Whether the Court of Claims abused its discretion in permitting the Government to reopen the proof after the close of evidence, for the purpose of remedying a technical deficiency in its case.

STATEMENT

On March 7, 1952, petitioner, a wholesale jobber, contracted to supply the Philadelphia Quartermaster Depot with 1,175,400 brass buckles at $.064 per buckle. The total price for the buckles was $75,225.60 (Pet. App. 22). In its bid, petitioner had specified that the entire contract was to be performed by the Hatheway Manufacturing Company under subcontract (Pet. App. 25). Paragraph 27 of the General Provisions, Supply Contract, which accompanied petitioner's bid and were incorporated into the contract by reference, provided in pertinent part that "The performing of any of the work contracted for in any place other than that named herein is prohibited, unless the same is specifically approved in advance by the Contracting Officer. * * *" (Pet. App. 23).

Neither petitioner nor Hatheway had previously supplied or manufactured articles of this type and neither of them was familiar with the production costs involved (Pet. App. 21). Nevertheless, Hatheway offered to supply petitioner with the buckles at $.05785 per buckle (Pet. App. 21). The Government did not participate in petitioner's initial selection of Hatheway as subcontractor (Pet. App. 21) and, al-

though the Government was authorized to make a pre-award survey of Hatheway's facilities under the Armed Services Procurement Regulations, such a pre-award survey was apparently not made (Pet. App. 22).

Upon award of the contract, petitioner ordered Hatheway to proceed with the performance of the subcontract (Pet. App. 25). On July 9, 1952, no buckles having been delivered, petitioner discovered that Hatheway was insolvent and, thus, unable to perform the subcontract (Pet. App. 25). Petitioner thereupon immediately solicited bids from other manufacturers to complete its contract with the Government. The most favorable bid it received was that of Shields Fifth Avenue, which offered to supply petitioner with the requisite number of buckles at $.08 per buckle (Pet. App. 25-26).

Petitioner requested the Government to excuse it from performance and, when this was refused, sought, also unsuccessfully, an increase in the contract price to $.08 per buckle so that it could subcontract to Shields without loss to itself (Pet. App. 29). Insofar as the evidence reflects, petitioner at no time offered to adhere to the original contract price if the Government would permit the substitution of Shields as subcontractor in place of Hatheway (Pet. App. 29-30).

Meanwhile, on July 18, 1952, the contracting officer terminated petitioner's contract for default, finding specifically that petitioner's failure to perform was not excusable under the contract as arising out of causes beyond its control and without its fault or negligence (Pet. App. 26-27). Petitioner appealed this

determination and, on August 27, 1953, the Armed Services Board of Contract Appeals sustained the contracting officer (Pet. App. 30). In so doing, the Board found that the Government was willing to accept buckles manufactured elsewhere than at Hatheway, so that the only reason for non-performance by the contractor was its refusal to incur the increased cost of obtaining the buckles from another source (Defendant's Exhibit No. 2, R. 90). The contracting officer, after issuing an invitation to numerous suppliers and securing 14 bids, awarded a repurchase contract to Dorset Products, Inc., on October 1, 1952, at a total price of $98,721.86 (*i.e.*, $23,893.52 more than the amount provided in petitioner's contract) (Pet. App. 28).

As a result of petitioner's default on the buckle contract and the increased expense thereby caused the Government, the Government withheld payment of $23,244.56 from petitioner under contracts admittedly performed (Pet. App. 20-21). On January 27, 1954, petitioner filed its action in the Court of Claims to recover the withheld amounts (Pet. App. 30). The Government thereafter counterclaimed for the balance of excess costs sustained as a result of the necessity of reletting the buckle contract (Pet. App. 11). Following trial, the commissioner resolved the principal issue of petitioner's contractual obligation in favor of the Government. He nevertheless concluded that, despite the obvious merit of its counterclaim, the Government was not entitled to recovery because it had failed to prove performance and payment of the repurchase contract (Pet. App. 18).

In a unanimous opinion, the Court of Claims dismissed petitioner's complaint and awarded judgment to the Government on the counterclaim. At the outset, the court agreed with petitioner that contracts based upon a sole source of supply may be unenforceable against a promisor when, because of destruction of the source, they become impossible to perform. But the court found that Hatheway was not a sole source of supply; that, on the contrary, there were many other manufacturers able and willing to supply the buckles, albeit at a price which would have required petitioner to perform the contract at a loss. The court also found that the Government did not view Hatheway as the sole source of supply of the buckles and would have permitted petitioner to perform at the original contract price. On these findings, the court held that the contract was not impossible of performance, and that therefore petitioner was bound to perform (Pet. App. 16).

The court then turned to the commissioner's conclusion that the evidence before him did not establish that the repurchase contract had either been performed or paid for. While agreeing with that conclusion, the court noted that, subsequent to the filing of the commissioner's report, the Government had secured from the General Accounting Office, and furnished as an offer of proof at the argument of the case before the court, certified copies of the vouchers and cancelled checks covering payment under the repurchase contract. The court granted the Government's motion to reopen the proof to the extent of having these documents admitted in evidence on the ground that failure to consider them would deny

relief to the Government on what was otherwise a meritorious counterclaim. It thereupon found that the Government was entitled to recover $648.96 on its counterclaim (the difference between the excess costs incurred by reason of petitioner's default and the amount withheld) (Pet. App. 18-20).

ARGUMENT

The Court of Claims correctly held that, in the circumstances of this case, the insolvency of petitioner's supplier did not relieve petitioner of the obligation to perform its contract with the United States. Additionally, the court below properly exercised its discretion in permitting the Government to reopen the proof on its counterclaim to remedy a technical deficiency. There is no conflict of decisions and none of the questions presented is of general importance. Accordingly, further review is not warranted.

1. Petitioner's argument that the performance of its contract was rendered impossible by the insolvency of its supplier Hatheway is without substance. As the court below found, several other buckle manufacturers submitted bids in response to the invitations which were extended by both petitioner and the Government after the discovery of Hatheway's insolvency. Further, notwithstanding petitioner's contention to the contrary, the contract did not forbid resort by petitioner to another supplier. Paragraph 27 (*supra*, p. 2), upon which it relies, merely required petitioner to obtain the advance approval of the contracting officer respecting any contemplated change in the place of performance of the work. Insofar as the

record shows, petitioner never sought permission to perform the contract at the stipulated price by substituting Shields, or some other supplier, for the insolvent Hatheway. And, as observed by the Court of Claims, it can be readily inferred from the record as a whole that, if it had been requested, such permission would have been granted.

As is evident from petitioner's offer to meet its contractual obligation provided the Government agreed to raise the contract price from $.064 to $.08 per buckle, the sole effect of Hatheway's insolvency on the performance of the contract was an increase in the cost of that performance. It is an established principle of contract law, however, that increased difficulty or expense is insufficient to excuse the nonperformance of a contractual obligation. See *e.g.*, *Carnegie Steel Co.* v. *United States*, 240 U.S. 156; *Day* v. *United States*, 245 U.S. 159; *Poloron Products, Inc.* v. *United States*, 126 C. Cl. 816; *Industrial Engineering Co.* v. *United States*, 92 C. Cl. 54; 6 Corbin on *Contracts* § 1333 (1951); 6 Williston on *Contracts* § 1963 (Rev. ed., 1938).[1]

2. There is no merit to petitioner's contention (Pet. 9) that the Court of Claims erred in permitting the Government, after the close of evidence, to remedy a

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[1] Petitioner's reliance (Pet. 7) upon *Operators' Oil Co.* v. *Barbre*, 65 F. 2d 857 (C.A. 10) is misplaced. As the Tenth Circuit stressed (65 F. 2d at 859), the contract involved in that case contemplated that the oil was to be supplied from a particular source "and no other." As heretofore noted, petitioner's contract expressly permitted the substitution of another source of supply subject to the obtaining of the approval of the contracting officer.

technical deficiency in its proof by submitting certified copies of the vouchers and cancelled checks proving payment to Dorset under the repurchase contract. It is settled that the reopening of a case after trial to permit the introduction of further evidence is within the discretion of the court. See *e.g.*, *Ditter* v. *Yellow Cab Co.*, 221 F. 2d 894, 899 (C.A. 7); *National Labor Relations Board* v. *Pacific Intermountain Express Co.*, 228 F. 2d 170, 176 (C.A. 8), certiorari denied, 351 U.S. 952. Certainly, in permitting the Government to supply evidence of payment of the repurchase contract so as not to deny relief to it on an otherwise meritorious counterclaim, the Court of Claims can not be said to have abused its discretion.

Petitioner's assertion (Pet. 9) that the documents proving payment on the repurchase contract were improperly certified is equally without merit. By virtue of 31 U.S.C. 46, copies of official papers certified by the Comptroller General may be admitted into evidence. And 31 U.S.C. 52(e) provides that official acts performed by employees "specially designated therefor by the Comptroller General shall have the same force and effect as though performed by the Comptroller General in person." On the certification in question, the certifying officer's signature is accompanied by the notation: "By direction of the Comptroller General of the United States", as well as by the General Accounting Office seal.[2]

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[2] Contrary to petitioner's apparent belief (Pet. 9), there is no requirement that the official position of the certifying officer be stated on the certificate. We have been advised by the General Accounting Office, however, that, at the time of certification, the certifying officer here was Chief of the

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1958.

Records Information and Research Section, Records Management and Services Branch of that office. He was specially designated to certify copies of official documents by Comptroller General's Order No. 1.43, Section 2, June 10, 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1958 471004 1693